Journal of Air Law and Commerce

Volume 39 | Issue 1 Article 4

1973

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RECENT DEVELOPMENTS IN INVERSE CONDEMNATION OF AIRSPACE

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The current concern for environmental protection has two significant impacts on aviation. First, controlling or preventing adverse effects of airport noise and aircraft pollution and second, when these preventive measures fail, developing legal remedies for the invasion of the use and enjoyment of property. In this second area, the traditional concepts of nuisance and trespass are being displaced by the development of the theory of inverse condemnation as a method of compensation when an airport's activities interfere with the rights of adjacent landowners. Mr. Russell analyzes the rights of airspace ownership, the available remedies for invasions of those rights and posits additional questions requiring resolution if the concepts of real property law are to keep pace with the growth of the technology of aviation.

PRIOR TO 1946, the legal remedies for invasions of the use and enjoyment of land available to land owners against adjacent airport and aircraft operations were largely restricted to trespass and nuisance law. Rights of airspace ownership were grounded in one of several prevailing theories: (i) a landowner owned all of the airspace "from the heavens to the depths of the earth"[1]; (ii) a landowner owned all of the airspace, but was subject to a public easement for flight; (iii) a landowner owned that amount of airspace fixed by statute; (iv) a landowner owned airspace to the extent that he could effectively possess it; and (v) a landowner owned all the airspace that he could actually occupy.[2]

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[1] 3 W. BLACKSTONE, COMMENTARIES 217.

[2] *See* C. MANION, LAW OF THE AIR (1950); Anderson, *Some Aspects of Airspace Trespass*, 27 J. AIR L. & COM. 341 (1960).

In 1946, however, *Causby v. United States*[3] introduced a new concept into the law of airspace. The United States Supreme Court in *Causby* stated:

> [S]uperadjacent airspace is so close to the land that continuous invasions of it affect *the use* of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.
> . . . the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it . . .[4]

The Supreme Court thus recognized the principle of eminent domain as applied to the use of airspace and the rights of adjacent landowners.[5] *Causby* departed from established theories of trespass/ownership, but combined elements of trespass with those of nuisance; the decision thus marked the advent of the theory of inverse condemnation. In 1962 the Supreme Court again dealt with this theory in the case of *Griggs v. Allegheny County*,[6] which reinforced the *Causby* opinion and made clear the Court's position that the local governmental airport authority, rather than the aircraft operators using an airport, was liable for a taking.[7]

Briefly stated, the term "inverse condemnation" designates a cause of action against a governmental entity to recover the value of real property that has been taken, even though the power of eminent domain has not been exercised.[8] Thus, when private property has been "taken" for a public purpose by a governmental authority, and no procedure has been provided by statute to afford an applicable or adequate remedy, the landowner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation for the property taken.[9] The theory of inverse condemnation thus affords a legal remedy to the landowner who has

[3] 328 U.S. 256 (1946).

[4] *Id.* at 264-65. *See also* R. WRIGHT, THE LAW OF AIRSPACE 155 (1968) [hereinafter cited as WRIGHT].

[5] WRIGHT, note 4 *supra*, at 156.

[6] 369 U.S. 84 (1962).

[7] J. Struck, Aviational Easements-Case Studies, THE RIGHT-OF-WAY MAGAZINE, Oct., 1962.

[8] U.S. CONST. amend. V; Charlotte v. Spratt, 263 N.C. 656, 140 S.E. 2d 341, 346 (1965).

[9] Charlotte v. Spratt, 263 N.C. 655, 670, 140 S.E. 2d 341, 346 (1965).

been substantially deprived of the right to use and enjoy the land by governmental authority.[10]

Cases since the 1962 *Griggs* decision, however, demonstrate that the doctrines of nuisance and trespass have not been totally nullified by inverse condemnation. Indeed, courts have often blended nuisance and trespass together into a peculiar amalgamation, partly as a result of "the scattergun approach of the attorneys for the plaintiffs."[11] Moreover, some courts have treated nuisance situations with trespass terminology and vice-versa. The cases since *Griggs* have predicated recovery for inverse condemnation upon proof of both physical invasion of plaintiff's land as well as substantial interference with the use and enjoyment of that land. The theory of inverse condemnation has thus effectively absorbed the doctrines of trespass and nuisance and, indeed, now depends upon them for existence.

I. WHAT IS A "TAKING" OF AIRSPACE?

A. *The Overflight Requirement*

A "taking" of property by aircraft operation requires a physical invasion of the airspace within the boundaries of plaintiff's property. *Batten v. United States*,[12] decided by the Tenth Circuit Court of Appeals in 1962, stands today as the primary authority for the proposition that a physical trespass defines a "taking." The *Batten* case involved noise, vibration and smoke emissions from jet aircraft operations at a nearby military base impeding the use and enjoyment of nearby private homes, even though there was no physical invasion of the premises. The court observed that the legal theory of the litigation did not involve a tort or nuisance, but instead a taking without compensation. Plaintiffs argued that since the actual damage in *Causby* was caused by noise and vibrations resulting from vertical sound and shock waves, recovery should also be allowed for lateral waves. The *Batten* court, however, denied recovery without the direct physical invasion that had occurred in both *Causby* and *Griggs*. The court conceded the noise, vibration and smoke that was incidental to the operation and maintenance of

[10] Thornburg v. Port of Portland, 376 P.2d 100 (Ore. 1962).

[11] WRIGHT, note 4 *supra*, at 157. *See also* Trippe v. Port of New York, 236 N.Y.S. 2d 312 (N.Y. App. Div. 1962).

[12] 306 F.2d 580 (10th Cir. 1962).

jet aircraft disturbed the peace and quiet in every neighboring residential area, but held nevertheless, that "recovery [is to be] uniformly denied" absent a physical invasion of the airspace.[13] The court stated:

> The vibrations which caused windows and dishes to rattle, the smoke which blows into the homes during the summer months when the wind is from the east, and the noise which interrupts ordinary home activities do interfere with the use and enjoyment by the plaintiffs of their properties. Such interference is not a taking. The damages are no more than a consequence of the operations of the base and . . . may be compensated by legislative authority, not by force of the Constitution alone.[14]

The rationale of the dissenting opinion filed in *Batten* has engendered criticism of the majority rule.[15] In dissenting, Judge Murrah stated:

> . . . the constitutional test in each case is first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justness, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone.
> . . . The interference shown here was sufficiently substantial, direct and peculiar to impose a servitude on the plaintiffs' homes, quite as effectively as the overflights in *Causby* and *Griggs* . . . I would, therefore, hold the damages constitutionally compensable.[16]

Subsequent cases that involved the overflight issue have nevertheless tended to follow the *Batten* majority.[17] Some have applied a "500-foot rule" of overflight, which requires that a taking involve not only a physical trespass of the airspace, but also that the overflight be less than 500 feet above the surface.[18] The trespass requirement has also been applied when sonic boom test flights were

[13] *Id.* at 584.

[14] *Id.* at 585.

[15] *See, e.g.*, Martin v. Port of Seattle, 391 P.2d 540, 546 (Wash. 1964).

[16] Batten v. United States, 306 F.2d 580, 587 (10th Cir. 1962).

[17] *See, e.g.*, Creel v. Atlanta, 399 F.2d 777 (5th Cir. 1968); East Haven v. Eastern Airlines, Inc., 331 F. Supp. 16 (D. Conn. 1971); Schubert v. United States, 246 F. Supp. 170 (S.D. Tex. 1965).

See also, e.g., Hoyle v. Charlotte, ___ N.C. ___, 172 S.E.2d 1 (1970) for a recent state decision in this vein.

[18] Schubert v. United States, 246 F. Supp. 170 (S.D. Tex. 1955).

conducted six to nine miles above the ground. In *Bennett v. United States*,[19] a federal district court for the Western District of Oklahoma stated:

> . . . government activities which do not directly encroach on private property are not a taking within the meaning of the Fifth Amendment, even though the consequences of such acts impair the use of the property . . . All the flights involved in this case which caused the sonic booms were in navigable airspace and, although the plaintiff may have suffered because of the alleged nuisance and some inconvenience, such nuisance and inconvenience are incidental and unavoidably attendant to use of airways.[20]

B. *Trespass and Substantial Interference: Transition*

Some courts that have insisted upon the existence of a physical invasion for a taking have recently re-examined the trespass requirement.[21] Although unwilling to completely forsake the majority rule of *Batten*, courts have begun to consider more carefully the reasons why landowners complain of aircraft overflights; and, in this sense, the theory of inverse condemnation has turned to nuisance law for its further development.

In 1969, the district court for the Northern District of Georgia held that the question whether overflights constituted a taking was a question of fact for the jury and could not be disposed of by a motion for summary judgment. The court observed: "The ultimate question in this case is whether the overflights have rendered plaintiffs' property undesirable and unbearable for residential use."[22] Courts have been reluctant to abandon the simplicity of the trespass requirement and have only diffidently suggested an alternative—usually couched in nuisance terminology:

> The gravamen of an action for the taking of an easement of flight is the unreasonable interference with the use and enjoyment of the land. Actual invasions by low-flying aircraft (at frequent intervals) over some part of a tract *may be* necessary in the present state of the law, to trigger the right to relief.[23]

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[19] 266 F. Supp. 627 (W.D. Okla. 1965).

[20] *Id.* at 629-630. See also Kirk v. United States, 451 F.2d 690 (10th Cir. 1971), *cert. denied*, 406 U.S. 963 (1972); Maynard v. United States, 430 F.2d 1264 (9th Cir. 1970); Neher v. United States 265 F. Supp. 210 (D. Minn. 1967).

[21] *E.g.*, Hanover v. Morristown, 108 N.J.S. 461, 261 A.2d 692 (Super. Ct. 1969).

[22] 164 Ct. Cl. 473, 475 (1964).

[23] Scarlett v. Atlanta, 306 F. Supp. 1049 (N.D. Ga. 1969).

Another federal court held that substantial interference with plaintiff's use and enjoyment of his land was a second requirement to that of physical invasion since an overflight, as the sole test of a taking, would allow "claims [that] would flood the courts [and] give rise to a . . . situation that would . . . be intolerable."[24] Other courts that have traditionally asked about trespass in actions for a taking have also inquired, as a corollary test, about a substantial interference with the use and enjoyment of plaintiff's land, in a manner contemplated by nuisance law.[25] One court held:

> Under the *Causby* rationale, it is not necessary to show either that the overflights interfere with an existing use of the land or that they occur through airspace which potentially might be occupied by the landowner: it is sufficient to show a taking if the overflights are low enough and frequent enough merely to interfere with some potential use of the land.[26]

The Fifth Circuit, however, has distinguished the above language and decided in 1968 that while overflights, as a taking, necessarily constituted a federal question, a district court should forbear until it becomes apparent that plaintiff cannot obtain adequate relief in state condemnation proceedings.[27]

Some recent decisions, on the other hand, while still requiring an overflight for a taking, have recognized the inadequacy of the trespass doctrine for these circumstances and have allowed recovery based on nuisance. For example, in *Ferguson v. City of Keene*,[28] a landowner complained that the use of a warm-up apron at an adjoining airport caused annoying noise and vibrations and constituted a taking. The New Hampshire Supreme Court held ". . . the plaintiff's writ and declaration failed to state a cause of action in inverse condemnation for want of any claim of overflight, but . . . a cause of action in nuisance is sufficiently alleged."[29] In contrast, the dissent in *Ferguson* acknowledged that ". . . in any event . . . a distinction based upon the nature of the invasion rather than

[24] Mock v. United States, 164 Ct. Cl. 473, 475 (1964) (emphasis added).

[25] U.S. v. 3276.21 Acres of Land, 222 F. Supp. 887, 891 (S.D. Cal. 1963).

[26] *See, e.g.*, Nestle v. Santa Monica, 10 Av. Cas. 18,238, 18,241 (Cal. Super. Ct. 1969).

[27] Atlanta v. Donald, 111 Ga. App. 339, 346, 141 S.E. 2d 560 (Ga. Ct. App. 1965), *rev'd*, 221 Ga. 135, 143 S.E.2d 737 (1965).

[28] Creel v. Atlanta, 399 F.2d 777 (5th Cir. 1968).

[29] 238 A.2d 1 (N.H. 1968).

the effect of it is unjustified."[30] The New Jersey decision of *Hanover v. Morristown*[31] balanced the equities between aircraft operations and the rights of landowners near an airport and held that the noise complained of was a nuisance, notwithstanding the failure of the landowners to prove overflights in their action for a taking.

> The rationale in both *Causby* and *Griggs* was that a taking occurred because the landowners had lost the use of the airspace immediately above the property to the extent it had been occupied by the government. Even if a liberal interpretation of a trespass theory is adopted, the weaknesses are clear. Liability and trespass arises only when the aircraft enters the zone of airspace 'owned' by the plaintiff. The plaintiff would have the almost impossible task to prove the exact height and the exact passage over his land at which the particular flight or flights occurred. In the case at bar the proofs clearly show that not only the immediate land below the flight is affected, but also that the neighbor to either side will frequently be harassed by the same noise.[32]

Nuisance theories have met with difficulty in some cases, however, partly because the issuance of an injunction has been deemed unduly burdensome to the public interest and the operation of public airports. Plaintiff's nuisance count was dismissed in *Bensenville v. Chicago*,[33] because the court believed the:

> . . . issue places the rights of the plaintiff municipalities in direct conflict with the interests of (a) air transportation; (b) the further development of the world's busiest airport; (c) economic progress; and (d) the handmaiden of both, *national defense*.[34]

Other courts have used different arguments in these cases, but the results have been the same: there is little chance of obtaining an injunction against operation of an airport that is owned or operated by a governmental authority.[35] Of course, a prospective nuisance,

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[30] *Id.* at 4.

[31] *Id.*

[32] Hanover v. Morristown, 108 N.J.S. 461, 261 A.2d 692 (Super. Ct. 1969).

[33] 12 Av. Cas. 17, 105 (Ill. Cir. Ct. 1971).

[34] *Id.* at 17, 108. *See also* East Haven v. Eastern Airlines, Inc., 331 F. Supp. 16 (D. Conn. 1971), upon which the court in *Bensenville* relied heavily.

[35] Thompson v. Atlanta, 219 Ga. 190, 132 S.E. 2d 188 (1963); Amherst v. Niagara Frontier Port Authority, 242 N.Y.S. 2d 831 (Sup. Ct. 1963); Schwab v. Burgess, 407 Pa. 531, 180 A.2d 921 (1962); Atkinson v. Dallas, 353 S.W. 2d 275 (Tex. Civ. App. 1962). *But see* Hanover v. Morristown, 108 N.J.S. 461, 261 A.2d 692 (1969); Nestle v. Santa Monica, 6 Cal. 3d 126, 496 P.2d 480, 101

such as the construction of an airport, is not to be enjoined[36] and an injunction is not to prevent anticipated or speculative airport activity.[37] The increasing use of inverse condemnation may partially explain the decline in use of injunctions to curtail aircraft operation.[38] Injunctive relief, however, does remain available against owners and operators of private airports, private corporations and in situations in which damages are not appropriate.[39]

C. *The Thornburg-Martin Line*

Some state courts early recognized the foresight of the *Batten* dissent, and have fashioned a sanguine "*Thornburg-Martin* approach" to inverse condemnation.[40] It differs from the approach that allows compensation for a taking by overflight, recovery for a nuisance or compensation for a taking when there is overflight-plus-nuisance. In *Thornburg v. Port of Portland*,[41] one of the specific issues considered by the Oregon Supreme Court was whether a "noise-nuisance" could amount to a taking since most of the flights over plaintiffs' land were not by jet planes causing the most noise. The plaintiffs proceeded on two theories: (i) that systematic overflights caused a nuisance and a substantial interference, which might ripen into a prescriptive right in favor of private parties or into the taking of an easement by the govern-

Cal. Rptr. 568 (1972). A recent decision of a federal district court sitting in Virginia held that it was proper to balance the equities of operations at Washington National Airport against those of complaining nearby residents, and the court dismissed plaintiff's suit for relief under the Administrative Procedure Act, 4 U.S.C. § 701 (1970), the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970), the Ninth Amendment to the United States Constitution, and the due process clause of the Fifth Amendment. Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972).

[36] Bowie v. County Commissioners, 271 A.2d 657 (Md. Ct. App. 1970).

[37] Overhaus v. Alexander, 57 Ohio 107, 274 N.E.2d 771 (Ct. App. 1971).

[38] Inglewood Resident's Prot. Ass'n v. Los Angeles, 11 Av. Cas. 17, 696 (Cal. Super. Ct. 1970); Bensenville v. Chicago, 12 Av. Cas. 17,105, 17,111 (Ill. Cir. Ct. 1971); WRIGHT, note 4 *supra*, at 182. *But see* Jensen v. United States, 305 F.2d 444 (Ct. Cl. 1962).

[39] WRIGHT, note 4 *supra*, at 182; Braides v. Mitterling, 67 Ariz. 349, 196 P.2d 464 (1948); Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964); Barrier v. Troutman, 231 N.C. 47, 55 S.E. 2d 923 (N.C. 1949); Hyde v. Somerset Air Service, 1 N.J. 346, 61 A.2d 645 (N.J. 1948); Hanover v. Morristown, 108 N.J.S. 461, 261 A.2d 692 (Super. Ct. 1969); Maitland v. Twin City Aviation Corp., 254 Wis. 541, 37 N.W.2d 74 (1949).

[40] WRIGHT, note 4 *supra*, at 180.

[41] 376 P.2d 100 (Ore. 1962).

ment; and (ii) that systematic flights close to, but not over, the plaintiffs' land amounted to the taking of an easement.[42] The government invoked the 500-foot rule and argued that the overflights did not constitute a trespass. The trial court agreed and found for the government. On appeal, the Oregon Supreme Court reversed, viewing the *Batten* dissent as "the better-reasoned analysis" of the principles involved. The court deemed the *Batten* majority opinion defensible only on the rationale that private rights must yield to public convenience in appropriate cases. If the governmental activity caused a substantial interference with the use and enjoyment of land and constituted a taking, the Oregon Supreme Court reasoned it was then immaterial whether the taking was trespassory or whether it was caused by nuisance factors. The court, therefore, concluded that a nuisance can amount to a taking whenever a possessor is ousted from the enjoyment of his land. Further, noise was held to constitute a nuisance and a taking of an easement, whether "a noise coming straight down from above" or whether ". . . the noise vector may come from some direction other than the perpendicular."[43] As a natural corollary to this conclusion, the court rejected the 500-foot trespass rule. The dissent argued that although:

> the damage created by a nuisance may equal a taking of the whole . . . this does not justify this court in stating that a nuisance may constitute the taking of a possessory interest in land, as contemplated by our constitution.[44]

In 1964, shortly after *Thornburg*, the Supreme Court of Washington decided *Martin v. Port of Seattle*,[45] in which there were overflights, but also some landowners not subject to overflights whose complaints were based strictly on noise. The court stated:

> We are unable to accept the premise that recovery for interference with the use of land should depend on anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land. The plaintiffs are not seeking recovery for a technical trespass, but for

[42] WRIGHT, note 4 *supra*, at 172.

[43] Thornburg v. Port of Portland, 376 P.2d 100, 106 (Ore. 1962).

[44] *Id.* at 116.

[45] 391 P.2d 540 (Wash. 1964), *cert. denied*, 379 U.S. 989 (1964).

> a combination of circumstances engendered by the nearby flights which interfere with the use and enjoyment of their land.[46]

The court deemed the *Batten* dissent to be more representative of the position of the United States Supreme Court and observed that "the problem of balancing the interests involved, public and private, seems much the same whether a physical trespass is or is not involved."[47] The court then sensibly explained *Causby* and *Griggs* in terms of noise and vibration, rather than overflights:

> Thus, in *Causby*, the noise which frightened the chickens . . . would presumably be equally inimical to the use of the land whether it came from directly overhead or obliquely from flights through the adjoining airspace of a neighbor. Again in *Griggs*, the loss of sleep due to noise and vibration was stressed as an important factor in allowing recovery, in addition to the fears engendered by the physical passage of the aircraft above or in close proximity to the home. The reliance placed upon the high noise level by the Supreme Court in both decisions, . . . strongly indicates that the holdings are not limited to those instances where the aircraft passes directly over the land.[48]

The result was a square holding by a second state supreme court, within two years of *Batten*, that no overflight nor direct physical invasion of airspace over plaintiff's land is necessary to maintain an action for a taking of land.

Other courts have acknowledged the *Thornburg-Martin* rationale. For example, the Oklahoma Supreme Court expressed clear agreement with *Thornburg-Martin* even though it decided only that it is for a jury to determine whether jet aircraft overflights at altitudes of less than 500 feet constitute a taking of an avigation easement:

> We believe the better rule is that there must be a substantial interference with the use and enjoyment of the property affected, in addition to showing low, continuous, frequent flights over *or in close proximity to* the plaintiff's property. The question of substantial interference is one that the trier of the facts must decide.[49]

The Tennessee Supreme Court has recently indicated a preference

[46] *Id.* at 545.

[47] *Id.* at 546.

[48] *Id.* at 545.

[49] Henthorn v. Oklahoma City, 453 P.2d 1013, 1016 (Okla. 1969).

for the *Thornburg* approach,[50] and the Florida Supreme Court seemed to favor *Thornburg-Martin* in holding that a nuisance *or* a series of trespasses could ripen into a taking.[51] It is unclear whether Georgia has rejected *Thornburg*.[52] The Ohio Supreme Court has specifically required a direct, physical encroachment for recovery, but has suggested a possible inclination toward *Thornburg-Martin*:

> . . . we think that a person's residence is a use for which he is entitled to compensation whenever he can prove a direct and immediate interference with that use.[53]

A later decision, however, demonstrated the unwillingness of Ohio courts to extend the above language further.[54] A California Superior Court acknowledged the existence of the *Thornburg* line in 1967, but nevertheless held that a taking or damaging unequivocally means a dollars-and-cents loss in real property value even though the offensive noise level had reached ninety-five decibels.[55] The same court, however, more recently dealt with *Thornburg-Martin* in *Aaron v. Los Angeles*.[56] There the court expressly denied that it was governed by *Thornburg*, which it deemed "the nuisance theory," or by *Martin*, deemed "the public benefit theory"; but these disclaimers are attributable to a concern for a definite means of damage computation, since the plaintiffs in *Aaron* numbered 1,500 and claimed only money damages for loss of real property market value caused by jet air noise, instead of personal injury or annoyance. Indeed, the rule has been stated:

> . . . a significant depreciation in the market value of the property as a direct result of the overflights is not only prerequisite to recovery of just compensation but also marks the date of taking from

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[50] Johnson v. Greenville, 222 Tenn. 260, 435 S.W.2d 476 (1968).

[51] Jacksonville v. Schumann, 167 So.2d 95 (Fla. Ct. App. 1964), *cert. denied*, 172 So.2d 597 (1965).

[52] Atlanta v. Donald, 111 Ga. App. 339, 141 S.E.2d 560 (Ga. Ct. App.), *rev'd*, 221 Ga. 135, 143 S.E.2d 737 (1965).

[53] State v. Columbus, 3 Ohio St. 2d 154, 209 N.E.2d 405, 408 (1965), *cert. denied*, 382 U.S. 925 (1965).

[54] State v. Akron, 5 Ohio St. 2d 47, 213 N.E.2d 353 (Ohio 1966).

[55] Los Angeles v. Mattson, 10 Av. Cas. 17, 632 (Cal. Super. Ct. 1970).

[56] 11 Av. Cas. 17, 642 (Cal. Super. Ct. 1970).

which applicable statutes of limitation commence to run and valuations for damage purposes are to be measured.[57]

The *Aaron* court was also disturbed by the *Martin* court's rejection of the view that insubstantial damage would be considered noncompensable, and by its holding that the slightest diminution of property values should be compensable.[58] The same concern for monetary damages was shared by the California Court of Appeals in *Nestle v. Santa Monica.*[59] The court there demanded that plaintiffs suffer diminution of property value to recover for a taking and held that emotional distress is noncompensable.[60]

Yet the real significance of *Aaron* and *Nestle* lies in their repudiation of *Batten* and the overflight requirement. In applying the "California theory," *Aaron* held that the noise from jet aircraft resulted in substantial diminution of the market value of the residential property proximately located to the landing and take-off pattern of an airport and constituted a taking or damaging of the properties within the meaning of the California constitution. Further, *Nestle* acknowledged that "[t]he signposts . . . indicate that the California law is that expressed in *Thornburg* . . . and *Martin*, rather than the restricted approach of *Batten.*"[61]

D. *Damages*

The concern for damage computation in these California cases and under *Thornburg-Martin* is real. *Aaron*, like *Martin*, raises a serious question whether liability can be determined apart from the issue of damages; even the *Aaron* court's thoughtful inquiry concerning the nature of offensive noise[62] did not avoid a result of the rules of condemnation law that have been carried over and used to determine damages in inverse condemnation cases since *Causby*.

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[57] Boardman v. United States, 376 F.2d 895, 899 (Ct. Cl. 1967), *cert. denied*, 390 U.S. 953 (1968). Of course, the court in Aaron v. Los Angeles, 11 Av. Cas. 17, 642 (Cal. Super. Ct. 1970) was construing the California constitution.

[58] Aaron v. Los Angeles, 11 Av. Cas. 17,642, 17,645 (Cal. Super. Ct. 1970). The court in Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964), however, was construing its own state's constitution.

[59] 11 Av. Cas. 18,358 (Cal. Ct. App. 1971).

[60] *Id.* at 18,363.

[61] *Id.* at 18,362.

[62] Aaron v. Los Angeles, 11 Av. Cas. 17,642, 17,648 (Cal. Super. Ct. 1970). *See also* Nestle v. Santa Monica, 6 Cal. 3d 126, 496 P.2d 480, 101 Cal. Rptr. 568 (1972).

The most enduring of these rules has been the familiar "before-and-after" market-price property evaluation, applied to the time of the taking.[63] This rule has been recently interpreted to mean: (i) compensable damage is not the inconvenience suffered with the closing of a street to extend the municipal airport runway, requiring residents to travel a longer route to their homes;[64] (ii) the rule is applicable to the time of filing a complaint for inverse condemnation;[65] and (iii) the "highest and best use" rule is still applicable in appropriate flight easement cases.[66] One flight easement case held that landowners have a right to interest and a right to be free from costs in these cases, including costs of appeal.[67] The District Court of Connecticut recently held that market value after the taking can be determined by considering:

> (1) the height of the planes over the subject property up to a maximum of 500 feet; (2) the distance of the property from the extended center line of the runway up to a maximum of 2,000 feet; (3) its distance from the end of the runway up to a maximum of 25,000 feet.[68]

Yet the actual extension of the loss-in-market value requirement to airport noise cases derives as much from *Thornburg, Martin* and the California opinions in *Aaron* and *Nestle* as from the entrenchment of that requirement in condemnation law prior to the advent of these cases. Although these courts have demonstrated foresight in their decisions concerning the nature of aircraft noise, substantial interference with property rights and the overflight requirement, the necessity of market-price evaluation in condemnation cases was retained with an accommodation to the respective state constitutions. Thus, it is still true, even in states that firmly oppose the overflight requirement, that ". . . in inverse condemnation the measure of recovery is injury to market value alone."[69] Any sub-

[63] Davis v. United States, 164 Ct. Cl. 612 (1964); Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1964); Mid-States Fats and Oils Corp. v. United States, 159 Ct. Cl. 301 (1962); Johnson v. Airport Auth. of Omaha, 115 N.W.2d 426 (Neb. 1962). *See also* Mock v. United States, 164 Ct. Cl. 473 (1964); Los Angeles v. Mattson, 10 Av. Cas. 17,632 (Ohio 1966).

[64] Horton v. Atlanta, 157 S.E.2d 501 (Ga. Ct. App. 1967).

[65] Jackson Municipal Airport v. Wright, 232 So.2d 709 (Miss. 1970).

[66] Mock v. United States, 164 Ct. Cl. 473 (1964).

[67] Oakland v. Nutter, 13 Cal. 3d 752, 92 Cal. Rptr. 347 (1970).

[68] East Haven v. Eastern Airlines, Inc., Civil No. 12175 (D. Conn. 1971).

[69] Martin v. Port of Seattle, 391 P.2d 540, 546 (Wash. 1964).

stantial deprivation of plaintiff's practical enjoyment of his land "must be translated factually by the jury into a reduction in the market value of the land."[70]

The necessity of diminution in market value of real property, however, seems inappropriate to cases in which substantial interference with use and enjoyment of the land, instead of the monetary value of the land itself, is the gist of the action.[71] This type of lawsuit, after all, is an attempt by human beings to stop further activity that interferes with the reasonable conduct of their normal, everyday lives. Loss in market value is highly persuasive evidence of substantial interference with use and enjoyment of land,[72] but an action for inverse condemnation should contemplate more than out-of-pocket loss. It does not appear reasonable, at least, to require proof of human hearing loss to show market value loss and thus a compensable taking. Yet two recent cases have done so.[73] Class actions may be appropriate when the parties are too numerous to bring before the court and when a community of interest exists among the members of a class. Of course, the beneficial interest of the representatives must be clearly demonstrated.[74]

On the other hand, relief from a widely shared annoyance such as aircraft noise may be better considered by legislatures or administrative agencies, which can deal with broader interests and issues than those of particular plaintiffs before a court.[75] Courts must necessarily draw a line between damages that are properly awarded from public resources and those that people must share with all others in the community, in return for benefits and services derived therefrom.[76] Across-the-board compensation to all residents

[70] Thornburg v. Port of Portland, 376 P.2d 100, 110 (Ore. 1962).

[71] Henthorn v. Oklahoma City, 453 P.2d 1013, 1016 (Okla. 1969). "The sine qua non is the question of interference."

[72] The *Aaron* court implies as much. 11 Av. Cas. 17,642, 17,649-50 (Cal. Super. Ct. 1970).

[73] Nestle v. Santa Monica, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972); Cunliffe v. County of Monroe, 63 Miss. 2d 62 (N.Y. Sup. Ct. 1970).

[74] Greater Westchester Homeowners' Ass'n, Inc. v. Los Angeles, 13 Cal. 3d 523, 91 Cal. Rptr. 720 (Cal. Ct. App. 1970); Alexizos v. Metropolitan Airport Commission, Memo No. 66891 (D. Minn. 1970). *See also* Virginians for Dulles v. Volpe, 344 F. Supp. 573, 575 (E.D. Va. 1972).

[75] Tondel, Federal Regulation of Aircraft Noise, the Legal Rights of Airport Neighbors, and Legal Aspects of Compatible Land Use, SAE/DOT Aircraft and the Environment (Jan. 1971).

[76] *Id.*

of an arbitrarily-determined zone of damage or interference forces a court to perform a function for which the legislature or an administrative agency may be better equipped.[77]

E. *Statute of Limitations*

Courts have satisfactorily resolved the issue of the time of a taking, *i.e.*, when a taking has occurred, but from what date does the statute of limitations begin to run? The court of claims has developed the rule that the statute does not begin to run until the flights produce a compensable taking, and that is often determined by events such as a change in flight pattern,[78] the advent of shrill, noisy jets,[79] the use of heavier jets,[80] the use of jet afterburners[81] or upon the general principle that a taking occurs when the flights increase to an extent that constitutes substantial interference with the use and enjoyment of the property, joined with the realization that the impairment will continue.[82] These reasonable rules militate against the requirement of trespass for a taking, even though they also demonstrate the difficulty in isolating the time at which an interference with the use and enjoyment of land has become of sufficient substance to warrant constitutional dignity.[83]

II. OTHER CONSIDERATIONS

A. *Liability for Taking*

Griggs had a significant impact in holding local governmental airport authorities liable for a taking, rather than the airlines, the

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[77] *Id.*

[78] Klein v. United States, 152 Ct. Cl. 221 (1961), *cert. denied*, 366 U.S. 936 (1961).

[79] A. J. Hodges Industries, Inc. v. United States, 355 F.2d 592 (Ct. Cl. 1966); Robertson v. United States, 352 F.2d 539 (Ct. Cl. 1965); Bacon v. United States, 295 F.2d 936 (Ct. Cl. 1961).

[80] Jensen v. United States, 305 F.2d 444 (Ct. Cl. 1962); Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961).

[81] Brin v. United States, 8 Av. Cas. 17,215 (Ct. Cl. 1962).

[82] A. J. Hodges Industries, Inc. v. United States, 355 F.2d 502 (Ct. Cl. 1966); Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963); Mid-States Fats and Oils Corp. v. United States, 159 Ct. Cl. 301 (1962); and more recently, Hoyle v. Caharlotte, 276 N.C. 292, 172 S.E.2d 1 (1970). *See also* WRIGHT, *supra* note 4. *But see* Boardman v. United States, 376 F.2d 895 (Ct. Cl. 1967), *cert. denied*, 390 U.S. 953 (1968).

[83] WRIGHT note 4 *supra*, at 190. *But see* Boardman v. United States, 376 F.2d 895 (Ct. Cl. 1967), *cert. denied*, 390 U.S. 953 (1968).

Civil Aeronautics Administration or the federal government. The Supreme Court looked to the local airport authority as the promoter, owner and lessor of the airport and consequently, the one who took the air easement in those circumstances. This holding reversed the Pennsylvania Supreme Court and contradicted other decisions.[84]

Griggs is still authoritative on this point, but *Griggs* did not involve any question of taking under Pennsylvania state law.[85] Liability was imposed upon the county of Allegheny for a taking under the fourteenth amendment of the United States Constitution; the dissent in *Griggs* argued that it was the United States that had taken petitioner's property, since the county had designed and planned the airport under the supervision of the Civil Aeronautics Administrator.[86] Nevertheless, the Ohio Supreme Court, in a 1971 per curiam opinion, summarily applied *Griggs* to the question whether the municipal airport authority or the aircraft operator is liable for the taking of a flight easement.[87] In addition, the federal district court of Connecticut held in mid-1971:

> There is no basis for holding that defendant airlines in operating their planes over plaintiff's property on the routes and at the altitudes prescribed by federal regulations, have also taken an easement in those properties. *Griggs*, which involved 'a number of airlines' did not so hold. On the contrary, it indicated that the airlines are not liable. No case comparable to this one has imposed liability on commercial airlines, as far as I can discover. I conclude that defendant airlines are not liable for a taking.[88]

A California Superior Court, however, denied motions for summary judgment by airlines and aircraft manufacturers against the city of Los Angeles' cross-complaints, on the theory that the cross-defendants were potential indemnitors of the liability to which the

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[84] Alfonso v. Hillsborough County Aviation Auth., 308 F.2d 724 (5th Cir. 1962); Corbett v. Eastern Airlines, Inc., 166 So.2d 196 (Fla. Ct. App. 1964).

[85] Griggs v. Allegheny County, 369 U.S. 84, at 91 n.2 (Black J., dissenting). *See also* Atlanta v. Donald, 221 Ga. 135, 143 S.E.2d 737 (1965); Westchester Homeowners' Ass'n v. Los Angeles, 13 Cal. 3d 523, 91 Cal. Rptr. 720 (Cal. Super. Ct. 1970).

[86] 369 U.S. 84, 91 (Black & Frankfurter JJ., dissenting).

[87] State, ex rel. Bower v. Columbus, 11 Av. Cas. 18,261 (Ohio 1971).

[88] East Haven v. Eastern Airlines, Inc., 11 Av. Cas. 18,289, 18,302-303 (D. Conn. 1971).

city might be subjected under state law.[89] Also the First Circuit has suggested that liability on the basis of *Griggs*, as between the airport authority and the airlines, may not be mutually exclusive. The court affirmed a conventional application of *Griggs*, but commented:

> Any involvement by the airlines in the alleged taking is derivative from their involvement with the Port Authority. Thus, jurisdictional questions aside, we will assume that if, but only if, the Port Authority violated the law, the airlines did likewise.[90]

B. *Zoning*

Airport zoning ordinances have significantly contributed to the growth of the modern airport,[91] and are likely to be sustained as valid exercises of the police power as long as they are reasonable and not arbitrary nor confiscatory in nature.[92] But when an ordinance restricts the use of adjoining land to the extent of effectively taking the private property, then it may be an unreasonable exercise of the police power. In *Jankovich v. Indiana Toll Road Commission*,[93] the Indiana Supreme Court invalidated, under the Indiana Constitution, a master airport zoning ordinance that had been violated by the construction of a toll road within an airport's prohibited inner area approach zone. The state court held that the ordinance constituted a taking of private property by the government for specific public use without compensation: "The [c]ity may not under the guise of an ordinance acquire rights to private property which it may only acquire by purchase or by the exercise of its power of eminent domain. . . ."[94]

The United States Supreme Court granted certiorari because it appeared that the decision might affect airport zoning ordinances in general under the fourteenth amendment. The Court, however, held that the Indiana decision was based on an independent and

[89] Greater Westchester Homeowners' Ass'n v. Los Angeles, 13 Cal. 3d 523, 91 Cal. Rptr. 720 (Cal. Super. Ct. 1970).

[90] Boston v. Massachusetts Port Auth., 444 F.2d 167, at 168 n. 5 (1st Cir. 1971), *aff'g* 320 F. Supp. 1317 (D. Mass. 1971).

[91] WRIGHT, note 4 *supra*, at 192; citing Strunck, *Airport Zoning and Its Future*, 50 A.B.A.J. 345 (1964).

[92] *But see* State v. Earl, 233 Ark. 348, 345 S.W.2d 20 (1961).

[93] 379 U.S. 487 (1965).

[94] Indiana Toll Road Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237, 242 (1963), *citing* Yara Eng'n v. Newark, 132 N.J.L. 370, 40 A.2d 559 (1945).

adequate state ground, thereby vitiating federal jurisdiction and necessitating a dismissal of the writ. This decision has given states a free hand in passing upon property acquisition in airport zoning cases.[95] The Indiana court held that rights to airspace above land were protected by the state's constitution; the Supreme Court found nothing to the contrary in the United States Consitution. Thus, *Jankovich* imparted constitutional importance to violation of airspace rights, but only on the basis of state law.

Mississippi followed Indiana by holding that a municipality's otherwise valid use of the zoning power to establish a clearance easement was limited by the Mississippi Constitution. Thus, when the police power intended to effect a height restriction in an instrument approach zone, it amounted to a taking of property within the meaning of the state constitution and compensation therefore was required.[96] Ohio has held that an airport zoning board's regulation concerning population density and concentration, as well as height of structures and objects in a prescribed flight corridor, amounted to a taking of private property for public use without compensation. The court did not mention whether the taking was prohibited by the state or the federal constitution.[97] *Jankovich* was cited, though not reconciled by the Ohio court, but the opinion can be read to mean that it was the prohibition in the Ohio constitution against the taking that had been violated.[98]

The California Court of Appeals invalidated a use of the zoning power as a taking of property adjoining a private airport when a county, in contemplation of the acquisition of an airport, adopted a height restriction ordinance for the property, after which the property was rezoned to a more restrictive classification and then made the subject of a general plan for airport development.[99]

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[95] WRIGHT, note 4 *supra*, at 196.

[96] Jackson Municipal Airport v. Evans, 191 So.2d 126 (Miss. 1966).

[97] Hageman v. Board of Trustees, 20 Ohio App. 2d 12, 251 N.E.2d 507 (1969).

[98] The conclusion of the Ohio Court of Appeals was that "There is nothing in the *state statutes* that authorizes the Wright-Patterson Air Force Base Joint Airport Zoning Board to exercise powers of eminent domain." (emphasis added). State eminent domain powers having been improperly arrogated by the airport board, it is presumed that the plaintiff's rights that had been violated were grounded in the Ohio Constitution. *Id.* at 512.

[99] Peacock v. Sacramento, 271 Cal. 2d 845, 77 Cal. Rptr. 391 (Cal. Ct. App. 1969).

These actions froze development of the property, even though the airport was never acquired by the county. This result was deemed a taking. A zoning ordinance may be used to limit the height of potential structures surrounding an airport to prevent general hazards to air traffic, but it cannot be used to avoid compensation for the taking of an avigation easement. If the ordinance results in limits upon surrounding land that deprives the owners of an essential amount of airspace, then there has been a taking instead of a valid exercise of the police power.[100]

C. *Prescription*

Since statutes of limitation apply to flight easements in inverse condemnation, rights in airspace may also be acquired by prescription.[101] Prescriptive rights of flight may be acquired, and lost, by acquiescence in the erection of an encroachment or barrier for the statutory period.[102] A Florida court has defined the time of taking as the time when jets began to land and take off frequently from an air facility; the court held that the prescriptive rights of an airport authority did not begin until that time, thus not barring plaintiff's inverse condemnation action.[103] A Kentucky court held that a municipal airport had no prescriptive rights to a clearance easement, ". . . for the simple reason that it has not exercised adverse rights in the space involved for fifteen years. . . ."[104]

D. *Eminent Domain*

When the government institutes a condemnation proceeding for the taking of only a flight clearance easement, may adjoining landowners force the taking of an avigation easement requiring compensation for both the clearance and flight easements? Deci-

[100] Sneed v. Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. (1953), quoting Justice Holmes' famous opinion in Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). Neither may a local zoning ordinance be used to prevent the establishment of an airport by a regional airport authority. Heath v. Licking County Regional Airport, 45 Ohio Op.2d 68, 237 N.E.2d 173 (1967).

[101] Trippe v. Port of New York, 17 App. Div. 2d 472, 236 N.Y.S. 2d 312 (App. Div. 1962), *rev'd*, 14 N.Y.2d 119, 198 N.E.2d 585, 249 N.Y.S.2d 409 (1964).

[102] Strother v. Pacific Gas & Elec. Co., 94 Cal. 2d 525, 211 P.2d 634 (Cal. Ct. App. 1949).

[103] Hillsborough v. Benitez, 211 So.2d 194 (Fla. 1967).

[104] Shipp v. Louisville, 431 S.W.2d 867, 870 (Ky. App. Ct. 1968), *cert. denied*, 393 U.S. 1088 (1968).

sions of federal courts seem to answer that question negatively,[105] but they have not restricted the state courts.[106]

The New Mexico Supreme Court dismissed a municipality's petition to condemn more property than reasonably needed for airport extension purposes and held that the municipality could take no greater interest than is reasonably necessary for the contemplated public use.[107] A municipality may consider future airport traffic demands that can be fairly and reasonably anticipated when establishing a need for the taking of private property for a flight clearance zone.[108] Prior approval of the FAA is not necessary to the exercise of eminent domain powers.[109] On the other hand, the imposition of curfews,[110] noise limitations[111] or other restrictions upon the use of navigable airspace invites conflict with the United States Constitution's supremacy clause, in addition to the state preemption of regulation of air flight.[112] The power to acquire property through eminent domain may be lawfully restricted by statute;[113] but a statute restricting a condemnor from acquiring further land rights need not prohibit the acquisition of easement rights to other land to protect land previously acquired for runways.[114]

III. CONCLUSION

Traditional concepts of real property law have clearly inhibited

[105] United States v. 452.13 Acres of Land, 210 F. Supp. 323 (D. Fla. 1962); Western v. McGehee, 202 F. Supp. 287 (D. Md. 1962).

[106] Bowling Green-Warrent County Airport v. Long, 364 S.W.2d 167 (Ky. 1962); Johnson v. Airport Authority, 173 Neb. 801, 115 N.W.2d 426 (1962).

[107] Carlsbad v. Ballard, 71 N.M. 397, 378 P.2d 814 (1963).

[108] Rueb v. Oklahoma City, 435 P.2d 139 (Okla. 1967).

[109] *In re* Condemnation of 10.670 Acres, 10 Av. Cas. 17,667 (Pa. C.P. 1967); Winner v. Lineback, 192 N.W.2d 705 (S.D. 1971).

[110] Lockheed Air Terminal, Inc. v. Burbank, 318 F. Supp. 914 (C.D. Cal. 1970), *aff'd*, 457 F.2d 667 (9th Cir. 1972).

[111] Opinion of the Justices, 271 N.E.2d 354 (Mass. 1971).

[112] Stagg v. Municipal Court, No. C932070 (Super. Ct., Los Angeles, June 6, 1968). Accord, American Airlines, Inc. v. Audubon Park, 407 F.2d 1306 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969); Rosenham v. United States, 131 F.2d 932 (10th Cir. 1942), *cert. denied*, 318 U.S. 790 (1943); American Airlines, Inc. v. Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969). *But see* Hanover v. Morristown, 108 N.J.S. 461, 261 A.2d 692 (N.J. Super. Ct. 1969).

[113] Massachusetts Port Authority v. R.S.R. Realty Co., 265 N.E.2d 860 (Mass. 1971).

[114] Loschi v. Massachusetts Port Authority, 354 Mass. 53, 234 N.E.2d 901 (Mass. 1968).

courts' responsiveness to the exponential growth of aviation. The erosion of the overflight requirement in airport noise cases is surely a salutary development; but this requirement, in an age of moon landings, only symbolizes the continuing challenge that aviation progress presents to the bench and bar. Further considerations in this field that merit the immediate attention of the legal community include:

(i) New definitions of human health, not limited to the mere "absence of disease or infirmity"[115];
(ii) Greater willingness of legislatures and courts to elevate environmental protection to constitutional level, either state or federal;[116]
(iii) Judicial inquiry into the reasons for the necessity of loss of market value of property in inverse condemnation cases; and
(iv) Admissibility of technological evidence of noise annoyance and interference, such as "noise exposure forecasts" and "effective perceived noise levels."[117]

Most important, it is for lawyers and judges to appreciate the importance of their role in shaping the future of aviation—and to plan accordingly.

[115] Virginians for Dulles v. Volpe, 344 F. Supp. 573, 575 (E.D. Va. 1972). *See, e.g.*, ILL. CONST. article I, in which a "healthful environment" is defined as "that quality of physical environment which a reasonable man would select for himself were a free choice available."

[116] *See* Virginians for Dulles v. Volpe, 344 F. Supp. 573, 579 (E.D. Va. 1972). *See also* Indiana Toll Road v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963); ILL. CONST. art. IX.

[117] *See* Aaron v. Los Angeles, 11 Av. Cas. 17,642, 17,648-649 (Cal. Super. Ct. 1970).

Notes and Comments